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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

THE STATE OF TEXAS,
Petitioner

v.

RODNEY GENE BROADWAY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Rodney Gene Broadway, Respondent, respectfully asks that this Court deny the Petition for Writ of Certiorari seeking review of the opinion of the Court of Criminal Appeals of Texas in the case of Ex parte Rodney Gene Broadway, number 69,836.

THE FEDERAL CLAIMS

The opinion of the Court of Criminal Appeals of Texas is based on the Texas Constitution as well as the United States Constitution. (App.[1] p. 1). Thus, this Court should not review that decision because it rests on an adequate and independent ground in state law. Herb v. Pitcairn, 324 U.S. 117, 128 (1945). This state ground is indicated clearly and expressly in the opinion of the Court of Criminal Appeals. See Michigan v. Long, 463 U.S. 1032, 1040-1041 (1983).

STATEMENT OF THE CASE

On pages 6 and 7 of the Petition for Writ of Certiorari, Petitioner misinterprets the testimony of Dr. H. Leake McCauley concerning Respondent's competency to stand trial. Dr. McCauley consistently testified that Respondent was not competent to stand trial. He never testified to the opposite conclusion. The portion of Dr. McCauley's testimony that Petitioner apparently misunderstands is the following:

Q: (By Prosecutor): "And as he sits there today he is perfectly -- he does know right from wrong and the nature and the qualities of his act, doesn't he?"

A: By (Dr. McCauley): "Well, as I say in regard to superficial things and in regard to as they are applied to other people, but I think should the situation be where he once again is placed in a situation where he had to call upon his basic resources of intelligence and abstract judgment to keep him in line with what society deems to be reasonable and appropriate, that he could not do that."

Q: "Well, there is no stress upon him at this time?

A: "He is protected. He has a man sitting behind him with a gun."

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[1]App. refers to the appendix filed as part of the Petition for Writ of Certiorari.

Q: "So he would know the nature and quality of his acts and would know right from wrong?"

A: "In a superficial sense, yes."

Q: "He would?"

A: "As he sits here in the courtroom today I would say yes." R. I 200-201.

Although the prosecutor may have intended to show that Respondent was competent as he sat in the courtroom that is not what he did. It is obvious that the prosecutor's questions concerned the legal test for insanity at the time of the offense and not competency to stand trial. The proper test to determine if an individual is competent to stand trial is "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402 (1960). The prosecutor did not even come close to asking Dr. McCauley if Respondent met this test. It is thus a clear distortion of the record to claim that Dr. McCauley testified that Respondent was competent to stand trial.

It should be remembered that in his findings of fact the trial court found that Respondent raised a bona fide doubt as to his competency to stand trial. (App. p. 4). Such a doubt is sufficient to require the trial judge to impanel a jury and hold a hearing on the accused's competency to stand trial. Pate v. Robinson, 383 U.S. 375, 385 (1966).

REASONS FOR DENYING THE WRIT

I.

THE COURT OF CRIMINAL APPEALS OF TEXAS HAS CONSISTENTLY REMEDIED VIOLATIONS OF PATE V. ROBINSON IN A MANNER CONSISTENT WITH THAT OPINION AND THE UNITED STATES CONSTITUTION

In Pate v. Robinson, 383 U.S. 375, 385 (1966), this Court held that where the evidence raises a bona fide doubt as to the defendant's competency, the trial judge must, on his own motion, impanel a jury and hold a competency hearing. Further, State procedures must be

adequate to protect an accused's right not to be tried while he is legally incompetent. Id. at 378. The failure of the State to develop and follow procedures adequate to protect a defendant's right not be tried while incompetent deprives the defendant of his due process right to a fair trial. Drope v. Missouri, 420 U.S. 162, 172 (1975).

The precise procedures that a State must adhere to in protecting a defendant's right not to be tried while incompetent have never been specified by this Court. It is thus fair to say that the states are free to follow whatever procedures they deem proper as long as those procedures do not fall below the minimum standards of due process.

The Court of Criminal Appeals of Texas has always interpreted Pate to require a competency hearing separate from the trial on the merits. Ex parte Johnson, 587 S.W.2d 163, 165 (Tex. Crim. App. 1979). This is so that the determination of an accused's competency can be made uncluttered by evidence of the offense itself. Ex parte Hagans, 558 S.W.2d 457, 461 (Tex. Crim. App. 1977). The Court of Criminal Appeals has never ordered a retrospective competency hearing in a case where the question of the defendant's competency was submitted to the same jury that decided the defendant's guilt or innocence. Instead, the Court of Criminal Appeals always finds a conviction in such a case to be fundamentally defective. See, e.g., Turner v. State, 626 S.W.2d 785, 786 (Tex. Crim. App. 1981). In every such case, the Court of Criminal Appeals reverses and remands the case for a new trial. Id.

This is clearly not a case where "The Court of Criminal Appeals has refused to acknowledge that the failure to hold a separate competency hearing may be harmless constitutional error." (Pet. for Cert. p. 8). Instead, this is a case where the Court of Criminal Appeals has followed clearly developed state procedures designed to protect a defendant's right not to be tried or convicted while incompetent. This falls directly under the mandate of Pate v. Robinson, supra.

The Court of Criminal Appeals decision below certainly does not conflict with any decisions of this Court. In fact, the case of Carey v. Piphus, 435 U.S. 247 (1978), cited by Petitioner, recognizes that procedural due process rules are shaped by the risk of error inherent in the truth-finding process. Id. at 259. It might be added that the

rules are also shaped by the interest they protect. Matthews v. Eldridge, 424 U.S. 319, 335 (1976). Thus the rules devised by the Court of Criminal Appeals to protect a defendant's right not to be tried while incompetent recognize the risk of error when the issues of guilt-innocence, sanity, and competency are submitted to the same jury [See, e.g. Ex parte Locklin, 583 S.W.2d 787, 790 (Tex. Crim. App. 1979)] and the difficulty that this Court has always recognized in holding a retrospective competency hearing. [See, e.g. Pate v. Robinson, supra at 387; Dusky v. United States, 362 U.S. 402, 403 (1960); Drope v. Missouri, 420 U.S. 162, 183 (1975)]. The procedure followed by the Court of Criminal Appeals is therefore proper and consistent with Pate v. Robinson, supra.

II.

THERE IS NO QUESTION OF HARMLESS ERROR IN THIS CASE

This case is not an appropriate vehicle for deciding "what factors are to be considered in determining harmless error under Pate v. Robinson." (Pet. for Cert. p. 10). As has already been demonstrated, the Court of Criminal Appeals remedied the Pate violation herein in a manner entirely consistent with that opinion. Petitioner simply dislikes the remedy chosen by the Court of Criminal Appeals to protect Respondent's right not to be tried or convicted while incompetent. This Court, however, should not overturn a remedy chosen by a state court that meets minimum due process levels.

III.

A VIOLATION OF PATE V. ROBINSON SHOULD NEVER BE CONSIDERED HARMLESS ERROR

The trial of an incompetent person violates due process. Drope v. Missouri, 420 U.S. 162, 172 (1975). State courts must therefore develop procedures to insure that an incompetent person is not put to trial. Pate v. Robinson, 383 U.S. 375, 378 (1966). When such procedures are not followed any conviction obtained against the defendant must be reversed. Drope v. Missouri, supra at 183. The protection of a defendant's right not be tried while incompetent is one of those substantial rights of a defendant the violation of which that can never be harmless. Chapman v. California, 386 U.S. 18, 23

(1967). This is because the trial of an incompetent defendant aborts the basic trial process. See, Rose v. Clark, _____ U.S. _____, 106 S. Ct. 3101, 3106 fn. 6(1986).

Once a bona fide doubt is raised as to a defendant's competency, as it was in this case, a defendant should be given a competency hearing separate and apart from the trial on the merits. This Court should not engage in the process of reweighing the evidence of the defendant's competency in order to determine if the failure to hold a separate competency hearing was harmless. Otherwise, there would never be a need to hold a separate competency hearing.

IV.

FACTS THAT COME INTO EXISTENCE
AFTER A DEFENDANT'S TRIAL SHOULD NOT
BE CONSIDERED IN DETERMINING WHETHER OR
NOT A VIOLATION OF PATE V. ROBINSON WAS HARMLESS

An appellate court should go no further in reviewing a violation of Pate v. Robinson, than determining if a bona fide doubt was raised as to the defendant's competency. If such a doubt was raised, then the Court should reverse the conviction in order to protect the defendant's right not to be tried while incompetent. A review of evidence that came into existence after the defendant's trial in order to determine if the defendant was incompetent when tried is particularly inappropriate because of the ever-changing nature of a person's mental status. Just because a person was competent six months or a year after his trial does not mean that he was competent when tried. In fact, a defendant's mental status may even change from one day to the next during his trial. Drope v. Missouri, 420 U.S. 162, 181 (1975).

It is certainly not proper for an appellate court to consider evidence that was never presented to the trial jury or reviewed by the witnesses, particularly the expert witnesses, who testified at the trial. Such a procedure would clearly not comport with due process.

V.

RESPONDENT CLEARLY RAISED A BONA FIDE
DOUBT AS TO HIS COMPETENCY AT HIS TRIAL

Respondent's psychiatrist, Dr. H. Leake McCauley, testified unequivocally that Respondent was incompetent to stand trial. Dr. McCauley never testified that Respondent was competent as he sat in the courtroom. What Dr. McCauley did say was that Respondent knew the nature and quality of his acts and the difference between right and wrong as he sat in the courtroom. Despite Petitioner's assertion to the contrary, this is not the same thing as saying that Respondent was "competent as he sat in the courtroom." (Pet. for Cert. p. 16).

There is no question that a bona fide doubt as to Respondent's competency was raised during Respondent's trial. On the day of trial, Respondent's attorney filed an affidavit of insanity alleging that Respondent was of unsound mind "at this time." (App. 4). Cf. Drope v. Missouri, 420 U.S. 162, 177 fn. 13 (1975). Dr. McCauley testified that Respondent was incompetent to stand trial. The trial court charged the jury on the issue of Respondent's competency to stand trial. (App. p. 5). On review, the habeas court found that indeed Respondent had raised a bona fide doubt as to his competency.

The evidence at trial clearly entitled Respondent to a separate hearing on his competency. Since he was not given such a hearing, the Court of Criminal Appeals reversed Respondent's conviction and ordered that he be given a new trial. Any burden on the State of Texas in retrying Respondent is simply irrelevant to the determination of this petition. Vasquez v. Hillery, 474 U.S. _____, 106 S.Ct. 617, 624 (1986).

VI.

ONCE A PATE VIOLATION IS ESTABLISHED,
A STATE COURT SHOULD BE FREE TO ORDER A
NEW TRIAL RATHER THAN A RETROSPECTIVE
COMPETENCY HEARING

The Court of Criminal Appeals of Texas held that the submission of the competency issue to the same jury that decided Respondent's guilt or innocence violated Respondent's right to due process under the United States and Texas constitutions. (App. p. 1). The Court of Criminal Appeals remedied that violation by reversing Respondent's conviction and remanding his case for a new trial. (App. p. 2). Such a procedure is clearly an adequate one under Pate v. Robinson, 383

U.S. 375, 378 (1966). There is thus no need for this Court to intervene and fashion a different remedy for the Pate violation in this case.

In the past, this Court has looked with disfavor on retrospective competency hearings. Pate v. Robinson, 383 U.S. 375, 387 (1966); Dusky v. United States, 362 U.S. 402, 403 (1960); Drope v. Missouri, 420 U.S. 162, 183 (1975). Despite Petitioner's protestations to the contrary, this case would be a particularly difficult one in which to hold a retrospective competency hearing. First, over twenty years have passed since Petitioner was originally tried. It is not reasonable to expect a competent psychologist or psychiatrist to testify as to the mental status of a person that many years ago. Further, Dr. H. Leake McCauley, the doctor who examined Respondent at the time of his trial, is now deceased. Respondent thus no longer has available to him expert testimony from a doctor who saw him at the time of his trial. The proper remedy in this case, therefore, would be to grant Respondent a new trial so that he would have the opportunity to obtain expert testimony on his present competency to stand trial. That is exactly what the Court of Criminal Appeals did.

VII.

A PATE VIOLATION IS NOT BARRED BY THE FAILURE OF TRIAL COUNSEL TO OBJECT TO THE ABSENCE OF A SEPARATE COMPETENCY HEARING

Petitioner argues that once the issue of incompetence has been made known to the trial court, that it is up to counsel to decide if the competency issue should be tried separately or alongside the issue of guilt or innocence. According to Petitioner, the failure to affirmatively request a separate competency hearing results in the waiver of the right to a separate hearing. This argument, however, ignores the language in Pate v. Robinson, 383 U.S. 375 (1966) that places the duty on the trial judge to impanel a jury and hold a hearing. Id. at 385. Counsel cannot, by some tactical choice, waive an accused's right to a separate competency hearing that is adequate to protect the accused's right not to be tried while incompetent. Just as it is contradictory to argue that a defendant may be incompetent, and yet knowingly and intelligently waive his right to

have the court determine his capacity to stand trial, it is just as contradictory to argue that an incompetent defendant may waive his right to a constitutionally adequate procedure designed to protect his right not to be tried while incompetent. See, Id. at 384.

CONCLUSION

The decision of the Court of Criminal Appeals of Texas rests on an adequate and independent state ground. Further, Petitioner has failed to show any error on the part of the Court of Criminal Appeals of Texas that justifies review by this Court. The Petition for Writ of Certiorari should accordingly be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On the 16th day of September, 1987, a true and correct copy of the Respondent's Brief in Opposition was mailed to Mr. David Chapman, Assistant District Attorney, 200 W. Belknap Street, Fort Worth, Texas 79196-0201.

Robert Udashen

AFFIDAVIT

I, Robert Udashen, hereby certify that on September 16, 1987, I mailed the original and three copies of the Respondent's Brief in Opposition by first class mail, postage prepaid, certified, to the Clerk of the Supreme Court of the United States for filing.

Robert Udashen

SUBSCRIBED AND SWORN TO before me by the above named Affiant this 16th day of September, 1987, to certify which witness my hand and seal of office.

Notary Public in and for
The State of Texas

My commission expires:
4-27-88